

- As previously noted, by written consent dated December 31, 1991, the Board approved a specified housing allowance for Mr. McClellan. (TBF Ex. 101, Tab EE, p. 33; ¶188 above);

- At an annual meeting on January 14, 1992, the Board considered and approved NMTV's audited financial statement for 1990, and discussed the corporation's gross receipts and expenses for 1991. The Board also discussed a schedule for bringing the corporation out of debt, and determined that a five year plan was feasible. (TBF Ex. 101, Tab EE, p. 34-35; MMB Ex. 386);

- At a special meeting on October 15, 1992, the Board authorized participating in the Community Brace project based on the terms that were then presented. (¶¶165, 197 above; TBF Ex. 101, Tab EE, p. 37; MMB Ex. 405); and

- At a special meeting on April 20, 1993, the Board concluded considerations that had taken place over the course of a year about whether to forgive a debt owed to NMTV by Prime Time Christian Television, Inc. (TBF Ex. 101, Tab EE, p. 42; MMB Ex. 412; Tr. 2038-39, 2232-33; ¶166 above.) After discussion, the Board voted to cancel the debt. (Id.)

215. With respect to its day-to-day operations, most NMTV purchase orders and check payments are authorized by Mrs. Duff as part of her responsibilities over those operations. (Tr. 1419, 2247-48, 3051; TBF Ex. 119; ¶63 above.) Dr. Crouch, NMTV's President, also authorizes purchase orders and check payments, particularly concerning technical engineering matters

about which he is experienced. (Tr. 1873, 2784-85, 2858, 3051; ¶32 above.) NMTV's station management has authority to approve expenditures up to \$500. (TBF Ex. 109, p. 10; Tr. 2250, 4452.) Mrs. Duff receives and reviews NMTV's check register on a monthly basis, a responsibility she does not have for TBN. (TBF Ex. 101, p. 37; ¶63 above.)

216. The physical administration of NMTV's bookkeeping and accounting is handled by TBN's accounting department pursuant to the January 2, 1991 "Agreement to Provide Business Services," which NMTV can terminate on 30 days notice. (¶195 above; TBF Ex. 101, Tab W, p. 2; MMB Ex. 337, p. 2; Tr. 1510, 4413.) That Agreement provides as follows:

"SERVICES TO BE PERFORMED

TBN agrees to provide bookkeeping and accounting services for Company, with the assistance of independent Certified Public Accountants, attorneys and consultants that TBN will engage as required. Such services shall include the preparation of Company's payroll, financial statements, federal and state income tax returns and reports, purchasing requirements as assigned to TBN, data processing and the servicing of Company's accounts payable. TBN agrees to provide Company with oral and written reports regarding such services as may be reasonably required by Company." (TBF Ex. 101, Tab W, p. 1; MMB Ex. 337, p. 1.)

The Agreement also provides that "TBN shall perform the services described in this Agreement as an independent contractor," and contains a section by which each party "agrees to indemnify and hold the other harmless with respect to claims, suits or liabilities arising out of the conduct, omissions or performance

of this Agreement by the other party." (TBF Ex. 101, Tab W, p. 2; MMB Ex. 337, p. 2.) Prior to the execution of that Agreement, TBN provided those services informally, subject always to NMTV's right as stated in its January 26, 1987 resolution to terminate them simply by giving notice of termination to TBN. (§195 above.) When it processes a purchase order for NMTV, TBN's accounting department identifies the order with a notation for the expense to be charged to NMTV and makes the correct entries in NMTV's books. (Tr. 1800-01, 1685; MMB Ex. 186; TBF Ex. 119, pp. 1-5, 7, 9, 13-15, 18-19, 22, 29-30, 34, 36-39, 41-42, 48-51, 90-91, 110-116, 118, 120-123, 125, 133, 138-49, 151-57.) Mr. May knew that TBN provided accounting services for NMTV and included his billings to NMTV as a separate itemization on bills forwarded to TBN which also included itemizations for TBN and TBN affiliates. (TBF Ex. 105, p. 6 and Tab D.)

217. Regarding checks, NMTV follows the practice of having two signatures on all payments above \$1,000 to provide an audit trail to assure the Internal Revenue Service that funds of a nonprofit corporation are not used for personal gain, which would jeopardize the corporation's tax exempt status. (TBF Ex. 101, pp. 31-32; Tr. 1475.) During her experience at TBN Mrs. Duff learned that TBN's professional tax advisors had counseled it to follow that practice for all such payments to maintain its good standing with the IRS, and NMTV has followed the same practice to preserve the integrity of its audits and its status as a nonprofit tax exempt organization. (TBF Ex. 101, p. 32.)

Starting at the January 1985 annual meeting, when NMTV anticipated that it might be receiving favorable action on its pending low power applications, NMTV began the practice of electing as Assistant Secretaries officers of TBN who would be available in light of the business services arrangement with TBN's accounting department to provide second signatures on checks if necessary. (TBF Ex. 101, p. 31; Tr. 1578, 2805.) They served as Assistant Secretaries of NMTV for convenience because of their accessibility in case other signatories were out-of-town or otherwise unavailable (Id.), and no TBN officer who served as an NMTV Assistant Secretary has ever refused to co-sign any NMTV expense that Mrs. Duff authorized. (Tr. 2249.) Pastors Espinoza, Aguilar, Hill, and Ramirez have not signed NMTV checks. (Tr. 1471-73, 2368.)

218. NMTV's revenues from the network are treated differently than the revenues of TBN's own affiliates. Based on its program Affiliation Agreement with TBN, NMTV's cost for the programming is 20% of the revenues received in donations from the zip code areas of NMTV's full and low power stations. (TBF Ex. 101, p. 41.) When those revenues are received, they are paid out to NMTV, which in turn makes a payment back to TBN for the 20% it owes, and which retains the other 80%. (Joint Exhibit 1, p. 24; TBF Ex. 101, p. 41; TBF Ex. 119, p. 157.) In contrast, the revenues received in donations from the zip code areas of TBN's own affiliate stations are not paid out to the affiliate pursuant to a contractual obligation; rather, they are

retained by TBN and are made available only as a credit or an intercompany transfer of funds to the affiliate when the TBN Board determines that such treatment is necessary to meet the station's expenses. (Tr. 3809, 3835, 3953.)

219. As part of the business services agreement, TBN's accounting department also arranges for TBN's certified public accountants to prepare NMTV's tax returns and audited financial statements and provides the requisite information to them. (TBF Ex. 101, Tab W, p. 1; MMB Ex. 337, p. 1; Tr. 2115, 2178-79, 2193, 2806, 2918, 2944, 2977, 2983.) As a tax exempt nonprofit corporation, NMTV naturally owes no taxes. (Joint Exhibit 1, p. 9.) From 1980 to 1987, NMTV's tax returns reflected an erroneous accounting practice of attributing the translator expenses of TBN to NMTV, but that error was corrected on TBN's tax return for 1987 and NMTV's tax return for 1988. (Id., pp. 18-19; MMB Ex. 272, p. 1.) During those years NMTV was not required to file this expense information on its returns, but it did. (Joint Exhibit 1, pp. 9-10.) NMTV tax returns filed with the IRS also have reported every year that NMTV's books are in the care of TBN or TBN officers. (Joint Exhibit 1, p. 8; MMB Ex. 272, p. 4; MMB Ex. 325, p. 4; MMB Ex. 375, p. 4; MMB Ex. 398, p. 4; MMB Ex. 413, p. 4.) For the years ending 1981 through 1987, a column for NMTV was included in the combined audit reports for TBN and its affiliates (Joint Exhibit 1, pp. 3-6), but commencing for the year 1988, the first year NMTV had an operating business, NMTV's audit reports have been separate. (Joint

Exhibit 1, p. 6; MMB Ex. 257, 322, 364; Tr. 1893.) NMTV also has had separate unaudited financial reports generated monthly for Mrs. Duff's review. (Tr. 2832-33.)

220. NMTV's financing to acquire and build its stations has come from TBN. (Joint Exhibit 1, pp. 19-20; Tr. 2874-75.) The amount of that financing grew starting in 1987 when NMTV was granted the Odessa construction permit through the years when the Odessa, Portland, and low power stations were built. (Joint Ex. 1, p. 19.) At the end of 1992 NMTV's obligation to TBN was \$5,030,442.47, and on January 1, 1993, NMTV executed a promissory note to TBN for that amount. (Id., pp. 19, 26; TBF Ex. 101, Tab II.) The note is due in five years, on January 1, 1998; contains no provision for interest except that late payments should bear interest at the rate of 10% per annum until paid; and contains no provision in its text for payment prior to the maturity date, although an associated schedule provides for monthly payments of \$27,004.50 and since January 1993 NMTV has been making monthly payments to TBN in that amount. (Joint Exhibit 1, pp. 26-27; TBF Ex. 101, Tab II, pp. 1-6.) The tax return that NMTV filed with the Internal Revenue Service in 1993 confirms that NMTV has a note payable to TBN at 59 monthly payments of \$27,004 with a lump sum payment for the balance due on January 1, 1998. (MMB Ex. 413, p. 14.)

221. When NMTV attempted to acquire the Wilmington station (§136 above), it borrowed \$4,000,000 from TBN and on August 23,

1991, executed a note in that amount which bore interest at 5% per annum. (Joint Exhibit 1, p. 26.) That note was repaid with interest when the acquisition failed to materialize. (Id.)

222. Although no notes other than the note regarding the Wilmington purchase were prepared prior to January 1, 1993, to formalize TBN's loans to NMTV, records of the loans were maintained and the parties intended for NMTV to repay them when it was able. (Tr. 2874-75, 1675, 1701, 1772, 2151, 2343-44.) In this regard, NMTV's tax returns consistently accounted for and reported to the Internal Revenue Service NMTV's existing liability to TBN (MMB Ex. 272, p. 3; MMB Ex. 275, p. 3; MMB Ex. 325, p. 3; MMB Ex. 375, p. 12; MMB Ex. 398, p. 13), and there is no record of TBN forgiving any portion of the NMTV indebtedness at any time since the correction of the accounting error described above. (Joint Exhibit 1, p. 27; Tr. 1441; ¶219 above.) Mrs. Duff expressed her expectation that, even without a note, NMTV "has to repay" (Tr. 1675); "the terms were that we would just repay it when we got the money" (Tr. 1701); "[i]t was all recorded that it could be ... reduced and [paid] at a later date ..., it was on the books that NMTV ... owed this money to TBN" (Tr. 1772); "there was always a record kept on the books, and then it was eventually reduced to a note." (Tr. 2151.) In fact, Mrs. Duff explained that one reason she was so enthusiastic about NMTV's opportunity to acquire the Portland construction permit was that NMTV "had debts that we needed to pay" and it was "critical" to have a station that would produce revenues

to pay them. (Tr. 1779; ¶72 above.) Dr. Crouch similarly expressed his goal that NMTV would one day pay off its debt to TBN and become "completely, totally self-sustaining" (Tr. 2343-44), and summarized his understanding as follows:

"Mr. Shook, it was always understood, certainly by me and I believe by all the other members of the boards of both National Minority and Trinity, that Trinity was to be the sponsoring corporation to this new entity. It was clearly understood that the funds would be loaned; that a careful accounting of those funds received would be recorded; and certainly in my mind I believed and hoped that the day would come when NMTV would become sufficiently viable to repay those loans, but to, to try and memorialize each and every small, medium, and large transfer of funds would have been a -- an onerous chore to, to, to place upon us. So we simply knew that a careful record of those funds was accumulating and that at some future date, if and when the company became viable and could become totally self-sustaining and, and emancipated, yes, it would -- it is my hope today that NMTV will in some way and in someday be able to repay those loans back to Trinity." (Tr. 2874-75.)

223. Dr. Crouch and Mr. Juggert acknowledged that TBN's financing to NMTV was not as formal or profit-oriented as would be the case under commercial standards. (TBF Ex. 104, p. 16; Tr. 2344, 3987.) In this regard, they explained that financial relationships between nonprofit religious corporations are typically less strict than those that exist between commercial entities. On this point Dr. Crouch testified,

"Well, in the world of for-profit corporations, if you loan money you expect it to be repaid with the best rate of interest you can exact. You deal much more formally in the world of for-profit corporations than, my experience is, in the world of non-profit corporations." (Tr. 2344.)

Mr. Juggert reiterated that "between religious organizations ... the intent is not to make money off of another non-profit corporation to be secured being repaid." (Tr. 3987.)

224. Dr. Crouch also indicated that the Commission's policy which permits him to hold an interest in NMTV as an incentive to provide financial assistance to minorities contributed to the favorable terms that TBN gave NMTV. Dr. Crouch explained,

"We did not worry about having a tight formal note, repayment schedule, or security for the advances that we made to NMTV, as we might have done with another party, even though such documents probably would have given TBN greater leverage concerning NMTV's operations if we wanted it. But we did not. TBN's relationship with NMTV was more informal and donative, because we understood the FCC wanted us to be the sponsoring organization to help the minority company succeed." (TBF Ex. 104, p. 16.)

Both Dr. Crouch and Mr. Juggert elaborated that, because Dr. Crouch had a position on NMTV's Board, he had knowledge of the company's affairs and TBN therefore would not always require as formal a lending arrangement as it would with a company in which TBN held no interest. (Tr. 2997-98, 3956.) Thus, Mr. Juggert explained that, for loans to corporations in which TBN has no representation on the Board, TBN has no knowledge of their internal workings and finances (Tr. 3819) and therefore requires security interests and notes with interest (Tr. 3956); however, for loans to companies with which TBN is internally involved and has such knowledge through representation on the Board of Directors -- as it is with NMTV under the Commission's policy --

the relationship is less "arm's length" and "looser." (Tr. 3820-21.) Dr. Crouch similarly explained that, while TBN would typically require a promissory note for a loan to a program affiliate where "I do not serve in any capacity in the board or officership ... so I really was not privy to what was going on to that corporation ... I was not on the board ... or involved in their business affairs or relationship at all" (Tr. 2997-98), the situation concerning NMTV was different and would not necessarily require a formal note. He thus stated:

"At least with the NMTV, I was a member of the board, I was able to attend board meetings, I, I knew about the internal operation and, and workings, and what was going on, so I had a much higher level of confidence as to the fact that the business affairs were being run well, were being looked after properly, so I think there is the distinguishing factor. I didn't feel quite the obligation on the part of NMTV to formalize these notes. It, it was, it was donative really on both cases, AATV or NMTV, but at least on NMTV I was on the inside, I could see what was going on, I knew it was being run right, I knew that decisions that -- were being made correctly, so for better or worse, there's, there's the distinguishing factor in my mind." (Tr. 2998.)

c. Role of Counsel

225. As discussed above (§§7-8), TBN is one of the nation's largest public charities. (TBF Ex. 104, p. 3.) From its inception, the corporation has retained and relied upon professional experts for guidance and advice to maintain its public and legal good standing. (*Id.*, pp. 3, 18.) As indicated earlier (§§14, 196 above), Norman Juggert has been TBN's principal legal advisor with respect to non-FCC matters since

the corporation was founded. (TBF Ex. 108, p. 1; Tr. 3648, 3681.) Although Mr. Juggert is an expert in matters concerning nonprofit charitable organizations, he has no proficiency in matters pertaining to the FCC, nor has he any familiarity or experience with the concept of de facto control. (TBF Ex. 108, p. 2.) To his knowledge, the notion of de facto control is not recognized under California law, and he is aware of no cases or statutes arising under California law that have dealt with that issue. (Tr. 3683, 3685-86, 3688-89, 3872-73.) Similarly, Mr. Juggert testified that he is not aware of any FCC rule, case or precedent that has defined or interpreted the term "control." (Tr. 3688.) Nor has he ever purported to have such knowledge, "other than what I've told you in terms of the Board of Directors being the controlling agents of the corporation." (Tr. 3689.) In this regard, Mr. Juggert explained that "[w]e had always been informed by [our] FCC attorneys that control was exercised by the Board of Directors." (Tr. 3688.) "They were virtually the owners of the corporation." (Id.)

226. Mr. Juggert testified that when NMTV was formed in 1980, it was never his thought that TBN control NMTV, nor had he ever heard anyone suggest that it would or should. (TBF Ex. 108, p. 1.) He explained that under California law it is illegal for one nonprofit corporation to control another, or even for one board of directors to enter into an agreement, whether formal or informal, to control another board. (TBF Ex. 108, pp. 1, 4; Tr. 3682-85.) Thus, as TBN's corporate counsel,

he stated that he would have reacted if he had perceived that TBN contemplated in any way exercising control over NMTV. (TBF Ex. 108, p. 1.) Mr. Juggert indicated that in his mind, the critical points were that the respective Boards of TBN and NMTV were autonomous, that under the law TBN had no ability to enforce control over another corporation, that the members of NMTV's Board were not obligated to follow the dictates of TBN, and that the Directors of NMTV were obligated to exercise independent discretion regarding the corporation's affairs. (TBF Ex. 108, pp. 1-2; Tr. 3854.) Indeed, Mr. Juggert testified that

"I've seen them do it. I've been in board meetings where they [NMTV's directors] have exercised very independent discretion. That corporation also, from the beginning, had a, a minority involvement in terms of the, the original two Board members, Jane and Mr. Espinoza. And I could elaborate on that, but I think what they brought to the corporation, what Aguilar brought to the corporation, what Dr. [Hill] brought to the corporation is different than what Paul and Jan Crouch and myself bring to Trinity Broadcasting Network." (Tr. 3854.)

Therefore, Mr. Juggert explained that because he considered the two entities as having separate and autonomous Boards of Directors, it never occurred to him that TBN could be charged with controlling NMTV. (TBF Ex. 108, p. 2.) To the contrary, he explained that he always understood and believed that TBN and NMTV were entirely different and unique. (TBF Ex. 108, p. 6; Tr. 3856, 3861-62.)

227. With respect to FCC matters, TBN has always relied on expert FCC counsel for guidance in that area. (TBF Ex. 108, p. 2.) Regarding its relationship with NMTV, TBN relied on Mr. May to ensure that it would remain in compliance FCC requirements. The record shows that from the outset, Mr. May was aware of the assistance that TBN was providing to NMTV and approved of it. (TBF Ex. 101, pp. 38-39; TBF Ex. 104, p. 17.) Specifically, Mr. May confirmed knowing that TBN and NMTV had a program affiliation agreement (TBF Ex. 105, pp. 15, 18; Tr. 3065, 3236); that TBN was providing NMTV with loans and an open line of credit (TBF Ex. 105, pp. 15-16; Tr. 3067, 3238, 3372-3377, 3575); that TBN was providing NMTV with business and accounting services (TBF Ex. 105, p. 16; Tr. 3200, 3258, 3333, 3373, 3575); that NMTV had access to TBN employees for assistance on engineering matters, station and studio construction, and FCC applications (TBF Ex. 105, p. 16); that TBN and its employees were providing NMTV with technical and engineering advice and operational and maintenance manuals (Id.); that TBN and NMTV were sharing common officers and personnel (TBF Ex. 105, p. 16; Tr. 3025, 3168, 3281, 3374); that they had consolidated financial statements which were reviewed at joint annual meetings (Tr. 3280, 3375-76); that both companies were receiving legal advice from Mr. Juggert (Tr. 3280, 3373); that the companies' respective procedures for approving purchase orders were identical (Tr. 3190-91); and that they were receiving bills jointly from May & Dunne for legal services. (Tr. 2946, 3330.)

228. Notwithstanding his knowledge of these various ties, Mr. May never advised NMTV, TBN, Mrs. Duff or Dr. Crouch that the relationship among them violated any Commission rule or policy. (TBF Ex. 105, p. 21; TBF Ex. 101, p. 39; TBF Ex. 104, p. 17.) To the contrary, Mr. May explained that since the NMTV Board could vote at any time to change its make-up or change its relationship with Dr. Crouch and TBN, he believed and so advised NMTV and Mrs. Duff that there was no bar to TBN providing services and assistance to NMTV. (TBF Ex. 105, p. 18.) Indeed, he testified that he believed and so advised Mrs. Duff and Dr. Crouch that the Commission was expressly encouraging group owners and/or their principals to become involved in minority owned companies, and to provide such companies as much help as possible in all areas of operations to help ensure success. (TBF Ex. 105, pp. 15, 21; Tr. 3202, 3225.) Mr. May recounted that for precisely this reason, he believed and so advised Mrs. Duff and Dr. Crouch that it was appropriate for TBN to provide NMTV with a substantial degree of technical and financial assistance. (TBF Ex. 105, pp. 15-16; Tr. 3168-69.)

229. Mr. May explained that his understanding in this regard was premised in part on his reading of the Commission's Multiple Ownership MO&O.^{41/} That document stated, in part:

"[W]e are adopting rules today which permit group owners of television and radio stations to utilize a

^{41/} Memorandum Opinion and Order, Docket No. 83-1009, Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership, 100 FCC 2d 74, 94-95 (¶45) (1985).

maximum numerical cap of 14 stations provided that at least two of the stations in which they hold cognizable interests are minority controlled. Group owners having a cognizable interest in at least one minority controlled television or radio station may utilize a maximum numerical cap of 13 stations. Extending this policy to the audience reach limit for television, we believe that a group owner having cognizable interests in a minority controlled television station should be allowed to reach a maximum of 30 percent of the national audience, provided that at least five percent of the aggregate reach of its stations is contributed by minority controlled stations." (Footnote omitted; emphasis added.)

Mr. May testified that from his reading of the MO&O, it seemed clear to him that the word "cognizable" meant that a group owner could have an active role in station operations, including the provision of programming, financial and management services, since under the Commission's rules "cognizable" owners are not insulated from such involvement. (TBF Ex. 105, pp. 13-14, Tr. 3398.)

230. Mr. May further explained that his belief in this regard also emanated from his reading of Rule 73.3555(d) (now rule 73.3555(e)), which provided in pertinent part (emphasis added):

"(d)(1) No license for a commercial AM, FM or TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers, or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in, either:

(i) more than fourteen (14) stations in the same service, or more than twelve (12) stations in the same service which are not minority controlled.

* * *

(3) For purposes of this paragraph:

* * *

(iii) 'Minority controlled' means more than 50 percent owned by one or more members of a minority group.

(iv) 'Minority' means Black, Hispanic, American-Indian, Alaskan Native, Asian and Pacific Islander."

231. Mr. May testified that he interpreted both the Multiple Ownership MO&O and Rule 73.3555(d) to mean that a group owner could "participate and have cognizable interests in minority companies as long as the minority companies meet these specific criteria, and that criteria is that they be minority owned." (Tr. 3225.) He explained that the Rule defined "minority control as being owned, and in that sense I'm understanding 'owned and controlled' to be the same thing." (Tr. 3225.) He recounted that this was in accord with his experience and awareness that, historically, the Commission has treated the directors of non-stock, nonprofit corporations as "owners," and with his knowledge that in the case of a nonprofit corporation the locus of control resides in its Board of Directors. (TBF Ex. 105, pp. 3-5; Tr. 3203, 3220, 3225, 3279, 3482, 3604.) Consistent with this understanding, he testified that his advice was as follows:

"minority control means more than 50 percent owned by one or more members of a minority group. So ... in my mind control and ownership are essentially and functionally, in the case of this nonprofit, the same thing. [A]nd as long as you meet the idea of minority

control being 50 percent owned by one or more members of a minority group, that was the basis upon which I was rendering advice and upon which people undertook a lot of activity, for which I sit here today." (Tr. 3222-23, 3492-94.)^{42/}

232. Mr. May testified that his advice was buttressed by Commissioner Dennis R. Patrick's separate statement dissenting in part to the Multiple Ownership MO&O. (TBF Ex. 105, p. 16.) Specifically, Commissioner Patrick stated:

"Under the majority's scheme, the right to purchase broadcast stations over the established ceiling turns upon the race of the proposed owners alone. No further showing is required with respect to how these new owners may contribute to diversity. No concern is given to whether the 51% minority owners will exert any influence on the station's programming or will have any control at all."^{43/}

Mr. May explained that, in his mind, Commissioner Patrick's statement confirmed his own understanding of how the Commission intended the Rule of 14 exception to work, "namely that: as long as a majority of the directors of a nonprofit/nonstock organi-

^{42/} For additional testimony concerning Mr. May's understanding in this regard, see: Tr. 3370 ("when your Board of Directors is controlled by a majority who are minorities, you meet the standard. In that sense the control of the minorities on the board is equivalent to the ownership question and vice versa. I mean, as long as fifty percent or more is owned by minorities, you meet the qualification"); Tr. 3491-92 ("... in the context of describing minority control, it said that [the issue is whether] ... you have fifty percent [or] more ownership and ... translating that into the world of non-profit, I regarded that to be a decision that's made when you look at the composition of the Board of Directors"); Tr. 3493, 3494 ("it says minority control means more than fifty percent owned by one or more members of a minority group and the Commission has always treated the principle of ownership in the non-profit based upon the composition of the Board of Directors").

^{43/} 100 FCC 2d at 104.

zation were minorities they would be regarded as the owners in control and would qualify under the rule." (TBF Ex. 105, p. 16.)

233. In view of this understanding, Mr. May explained that he never considered that NMTV's various ties to TBN might implicate the Commission's policies concerning de facto control. (Tr. 3206.) Although he acknowledged that Section 73.3555 of the Commission's rules would prohibit an entity such as TBN from controlling an entity such as NMTV (Tr. 3603-05), he explained that "I did not, in the way in which these organizations were constituted, believe that a de facto control issue was existent between the two companies, because I looked to the Board of Directors as the locus of control and essentially the ownership of the companies, and that was the basis upon which I advised my client and made the determination that they were compliant." (Tr. 3604.) In this regard, Mr. May testified that he viewed the Commission's policy as

"designed to create an exception for a group owner to work with and assist a minority company, and in that sense it just didn't occur to me that the issue of de facto control later down the road was going to somehow jump out and say: you're not supposed to do this and you're not supposed to do that, for example, provide accounting services or have an affiliation agreement or anything along those lines. And, so ... I thought that in this context, and it was the first time to my knowledge this has ever been done, that we were providing the material and we were in fact complying and fulfilling the very policy that the Commission was inviting people to do at the time by saying: we recognize the multiple ownership rules are not per se the best place to provide for minority enhancement, but, but we also recognize there are limitations in ... [the ability of minorities] to get financing and

to develop the expertise, and so we would permit that a group owner could have this cognizable interest and do these things." (Tr. 3204.)

Likewise, Mr. May recalled that he simply

"never thought of it in those contexts, the de facto [context] ... I read this policy and believed that the invitation was to permit the relationship [that] would then evolve, that's the advice I gave. Whether or not it was right or wrong or whether or not it was well-founded, it was the advice I gave, people acted on it and that's why we're here today and literally millions of dollars and hundreds of people's lives have been impacted as a result of what I did." (Tr. 3394.)

Upon further examination, he reiterated

"I never considered that de facto control in this context would be a problem, I frankly thought that under the rules the way I understood them and the advice that I gave was that they could do these things. I mean, for example, Your Honor, to the extent that they had ministerial function like accounting, that's not a control factor. I mean, people ... do ministerial things all the time.... I just didn't put it in the same context that it's ... being put into now. That's not to recognize that I don't see that the Commission disagrees with me and disagrees with me in very large proportions and I recognize that but I'm here to be open with this tribunal and to say to you, this is what I told these people, they relied on me to provide that advice, this is the advice I provide[d] and this is what was set in motion as a result and all of this has occurred because of the advice that I gave." (Tr. 3396.)

Mr. May specifically acknowledged that "the Commission may very much disagree with Colby May's interpretation" of the minority exception to the multiple ownership rules. (Tr. 3205, 3395.)

Nevertheless, he offered that

"what I'm providing you with is what I advised these people about. And what I advised these people about ... [was] this brand-new policy. The Commission is encouraging group owners to get involved in minority

organizations. I felt that ... National Minority was such an organization, that Trinity could become involved, and I did not see that involvement as being precluded or specifically limited in any area based upon what the Commission was trying to do." (Tr. 3205.)^{44/}

234. Mrs. Duff's recollection of the advice Mr. May provided is consistent with Mr. May's testimony on that subject. Initially, Mrs. Duff recalled being advised by Mr. May in conjunction with the preparation of NMTV's low power translator applications that "in dealing with nonprofit corporations that are governed by a Board of Directors, the FCC policy was to determine matters of control based on the composition of the Board." (TBF Ex. 101, p. 28.) Subsequently, Mr. May advised her in connection with NMTV's acquisition of the Odessa construction permit that

"because a majority of NMTV's Directors were minorities, NMTV could acquire the Odessa permit as a minority-controlled company under this provision of the FCC's multiple ownership rules that would allow Dr. Crouch to have an interest in two additional stations that were minority controlled. He told me that the FCC allowed group owners to be involved in two additional stations to assist minority-controlled

^{44/} Mr. May further described the impact of his advice as follows: Tr. 3222 ("I have to live with the years that have gone by since I rendered the advice"); Tr. 3494-95 (they "relied on me, looked to me to render the advice, I did render the advice and they acted accordingly. Now, I've recognized before that may not be something that anybody else in this courtroom can appreciate but that's what happened, that's what I did, that's what set in motion all of these things by result of that, that's why I'm here today [be]cause that's what I did"); Tr. 3397 ("Your Honor, I believe that the advice I gave was given in good faith, I believe it is rationally and in good faith presented. This tribunal may disagree with me [and] ... others may disagree with me but ... that's the advice I gave").

companies to acquire stations." (TBF Ex. 101, pp. 29-30; Tr. 1688-89.)

Consistent with this advice, Mrs. Duff explained that her understanding has been that "the FCC rules permit Dr. Crouch to have a 'cognizable interest' in NMTV, that his positions as President and Director are cognizable interests that were disclosed in NMTV's applications which the FCC approved, and that he therefore can perform the duties of those positions." (TBF Ex. 101, pp. 37-38.)^{45/} Thus, Mrs. Duff did not think that it was improper for Dr. Crouch to participate in NMTV's affairs, to identify possible station acquisitions, and to provide his input and expertise on matters concerning the company. (TBF Ex. 101, p. 38.) To the contrary, she thought that "such participation as the holder of a cognizable interest was precisely what the FCC rule contemplated." (Id.) For that same reason, Mrs. Duff testified that she has never believed that it was improper for TBN to provide NMTV with the various forms of assistance described in ¶227 above. (TBF Ex. 101, pp. 38-40.) Rather, "based on the advice I received from Mr. May, I have understood that the FCC's very purpose in allowing group

^{45/} During examination Mrs. Duff stated that she understands a cognizable interest in this context means an "officer, director interest" (Tr. 1506), which are the applicable cognizable interests in NMTV that Dr. Crouch holds as set forth in Note 2(h) to §73.3555 of the Commission's Rules ("Officers and directors of a broadcast licensee ... are considered to have a cognizable interest in the entity with which they are so associated"; see ¶597 below). Mrs. Duff also was aware that the significance of a cognizable interest is that it counts against the complement of stations that a party may own under the multiple ownership rules. (Tr. 1688-89, 1858-59.)

owners to hold cognizable interests in minority-controlled companies is to encourage group owners to provide substantial financial help and expertise to enable fledgling minority companies like NMTV to succeed." (TBF Ex. 101, pp. 38-39.)

235. Similarly, Dr. Crouch's recollection of Mr. May's advice is in accord with the testimony of Mr. May and Mrs. Duff. Specifically, Dr. Crouch testified that in connection with NMTV's decision to acquire the Odessa construction permit, Mr. May

"advised us that NMTV, being a minority-owned company, could acquire the Odessa permit. Mr. May advised that I could have what the FCC rule calls a 'cognizable interest' in a minority-owned company that could acquire up to two more stations. He further counseled that he believed NMTV complied with the requirements of this rule because it was minority owned by reason of the fact that the majority of the Board were minorities." (TBF Ex. 104, p. 14.)

Moreover, Dr. Crouch affirmed that

"[a]t the time NMTV decided to purchase the Odessa construction permit, FCC counsel Mr. May advised me that the FCC's policy was that, to encourage group owners to provide financing and expertise to help new minority-owned companies to enter the broadcast industry, parties who provided that help could have an active interest and role in the company. In fact, he said that not only would such an interest and role be allowable, they were encouraged in order that the minority-owned company would have available to it the expertise that was needed to succeed." (TBF Ex. 104, pp. 17.)

Thus, Dr. Crouch explained that he

"thought that, by serving as President and a Director and providing the benefit of my experience, and by having TBN provide the assistance it provided, I was doing exactly what the FCC wanted me to do. I cer-

tainly was not trying to assert any illegal or hidden control. The fact that I was President and Director of NMTV was recited in NMTV's various applications to the FCC, and FCC counsel knew of the assistance that TBN was providing and approved of it." (Id.)

236. Mr. May's advice not only affected the depth of TBN's assistance to NMTV, but it also affected the manner in which the parties viewed the relationship that emerged among TBN, Dr. Crouch and NMTV. As discussed in ¶¶205, 224 above, Dr. Crouch testified that TBN's perception of its relationship with NMTV was "contributory and donative." For this reason, Dr. Crouch explained that TBN did not follow a hard line business approach with NMTV, but rather permitted a more informal sponsoring relationship to develop between the two. (See ¶¶205, 208, 209, 223, 224 above.)

2. Abuse of Process Issue

237. This issue seeks to determine whether NMTV, Paul F. Crouch, TBN or TBN's affiliates or principals abused the Commission's processes when NMTV claimed minority preferences in low power television applications and applied for full power stations under the provisions of Section 73.3555(e) of the Commission's Rules.

a. Minority Preference in LPTV Applications

238. NMTV first claimed a minority preference at the FCC in February 1984, when Mrs. Duff signed certifications that NMTV was entitled to minority preferences with respect to three low

power television applications. (TBF Ex. 101, pp. 9, 27-28 and Tab 0; TBF Ex. 105, Tab H.) Prior to that time, both Mrs. Duff and Dr. Crouch had been advised by Mr. May that NMTV was entitled to certify a minority preference under the Commission's new lottery rules. (Tr. 3274.) Specifically, Mr. May recalled advising them that

"the Commission had issued the lottery procedures under which it would now decide among various competing applicants who would get the authorization. And in that process, it had determined that minority ownership was a factor it would consider. And in order to be entitled to receive that certification or that minority factor, you had to meet certain qualifications. And the ... Second Report and Order described ... who qualified for it and it stated that it was based on ... the composition of the Board of Directors. And at that time, Television Translator [NMTV] had two of three Directors who were minorities. And then when the Commission sent out its August 1983 public notice with the new minority certification materials and described who could certify, it indicated, as had the ... Second Report and Order, that if you had a majority of Directors who were minorities in a nonprofit corporation, you could certify the minority preference. And that's the basis upon which I rendered my advice." (Tr. 3275-76.)

239. Mr. May recounted that his advice was premised upon his reading of the Commission's Second Report and Order^{46/} adopting the lottery procedure, as well as his reading of the Commission's August 19, 1983, Public Notice, (Mimeo No. 6030), which set forth the instructions concerning minority preference claims. (TBF Ex. 105, p. 9 and Tab G, pp. 3-4; Tr. 3273-74.) Mr. May explained that the minority preference criteria set

^{46/} Second Report and Order, Docket No. 81-768, Lottery Selection Among Applicants, 93 FCC 2d 952 (1983).

forth in those documents were "consistent with my own legal experience and training that, in the case of a nonprofit/non-stock company, the Commission focused on the Directors when applying its policies and procedures." (TBF Ex. 105, p. 9.)^{47/}

240. In this regard, Mr. May stated that he relied upon the following language in the Second Report and Order in which the Commission provided that for the purpose of determining whether an applicant was qualified to certify a minority preference:

"[w]e agree with IBN and the Corporation for Public Broadcasting (CPB) that nonstock corporations, as well as other licensees operated by commissions, boards, or other governmental bodies, should be judged as to minority status on the basis of the composition of the Board. We believe that this treatment should also apply, for diversity purposes, to the holdings of board members. The same treatment should be afforded both nonprofit and for-profit nonstock corporations." (TBF Ex. 105, p. 9; emphasis added.)^{48/}

Mr. May also noted that the Commission further provided in ¶69 of that document that:

"[u]pon further consideration of our Notice proposal at paras. 39-40, regarding treatment of trusts, we believe that as to the minority ownership preference, the percentage each beneficiary derives as a portion of the whole should be considered, with more than fifty percent total minority share being required in order for preference to be awarded." (TBF Ex. 105, p. 10.)

^{47/} For additional testimony concerning Mr. May's understanding and experience concerning the FCC's treatment of nonprofit corporations, see ¶231 and n. 42 above.

^{48/} 93 FCC 2d at 977.